85-1130

Supreme Court, U.S.
FILED
DEC 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

Robert Hamilton, individually, Warren Bisbee and Marian Cosgrove, individually, and for Citizens For Responsive Government, Appellants

v.

Rose Aldag, Town Clerk for Los Gatos

Tom Ferrito, et al., Real Parties in Interest & Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Douglas B. Allen
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QUESTIONS PRESENTED

1. Does a state statute which allows town council members to consolidate town elections with local, state or national elections violate procedural due process requirements, if the statute on its face provides that in the event of a consolidation that the current representative terms of pertinent councilmembers will be extended beyond the lengths for which they were elected?

2. Does a registered voter have a sufficient liberty or property interest in participating in a regularly scheduled election such that the deprivation of the participation in violation of procedural due process is unconstitutional?

3. Does a registered voter have a sufficient liberty or property interest in having only elected individuals hold offices which are publicly recognized as representative such that the self appointment of council members to offices dominated by color of election is violative of procedural due process?

4. Is the right to vote in an announced election a sufficient liberty or property interest such that the deprivation of that vested right must meet procedural due process standards?

5. Whether the conflict of interest presented by California Government Section 36503.5, [which clearly sets the interest of incumbent council members to remain in office against the electorate's interest in preserving the integrity of the election system by allowing no person to serve under color of election for any term longer than for which he was elected] is sufficiently suspect to characterize the statute as violative of procedural due process?

6. Are appellant's contentions moot since the disputed town election has taken place and the state legislature has limited the self extension of any term allowed by Government Code section 36503.5 to 10 months despite the fact this election controversy is capable of repitition and yet evading review?

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In the Supreme Court of the United States

October Term, 1985

Robert Hamilton, individually, Warren Bisbee and Marian Cosgrove, individually, and for Citizens For Responsive Government, Appellants

v.

Rose Aldag, Town Clerk for Los Gatos

Tom Ferrito, et al., Real Parties in Interest & Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Robert Hamilton, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on September 11, 1985.

JURISDICTION

The judgment of the Sixth Appellate District Court became final on September 30, 1985 when a timely petition for review was denied by the supreme court of California. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1256 as appellants' contend that California Government Code Section 36503.5 is repugnant to the U.S. Constitution.

OPINIONS BELOW

The judgment of the supreme court of the State of California denying appellants' petition for review of the Sixth Appellate District's judgment in the case was unreported and is printed in Appendix A hereto, infra, page 13. The judgment of the Sixth Appellate District was entered on June 21, 1985, and became final on September 30, 1985, and was also unreported and is printed in Appendix B hereto, infra, page 14. The same controversy was the subject of a petition for writ of mandate to the supreme court of California prior to the filing of this civil suit. The denial of the writ to the supreme court of California was unreported and is printed in Appendix E hereto, infra, page 28.

STATUTE INVOLVED

California Government Code Section 36503.5. Option concerning when general municipal election held; Effect on terms of office; Notice to public

(a) "A city council may enact an ordinance requiring its general municipal election to be held on the same day as the statewide direct primary election, the day of the statewide general election, or on the day of school district elections, as set forth in Section 2602 of the Elections Code. Any ordinance adopted pursuant to this subdivision shall become operative upon the approval of the board of supervisors. An ordinance shall be approved by the board of supervisors unless the ballot style, voting equipment, or computer capability is such that additional elections or materials cannot be handled.

(b) As the result of the adoption of an ordinance pursuant to this section, no term of office shall be increased or decreased by more than 10 months.

(c) If an election is held pursuant to subdivision (a), and the election is consolidated with another election, the provisions contained in Part 2.5 (commencing with Section 23300) of Division 14, except Section 23302, of the Elections Code shall govern the consolidation, and, if the county clerk is requested to conduct the municipal election, Section 22003 of the Elections Code shall be applicable to that election.

(d) If, pursuant to subdivision (a), general municipal election is held on the same day as a statewide election or the same day as a school district election, those city officers whose terms of office would have, prior to the adoption of the ordinance, expired on the Tuesday succeeding the second Tuesday in April of an even-numbered year, shall, instead, continue in their offices until no later than the fourth Tuesday after the day of the general municipal election, and until their successors are elected and qualified.

(e) Within 30 days after the ordinance becomes operative pursuant to subdivision (a), the city clerk shall cause a notice to be mailed to all registered voters informing the voters of the change in the election date. The notice shall also inform the voters that as a result in the change in the election date, elected city officeholders' terms in office will be changed.

(f) If a city adopts an ordinance pursuant to subdivision (a), the municipal election following the adoption of the ordinance and each municipal election thereafter shall be conducted on the date specified by the city council, in accordance with subdivision (a), unless the ordinance in question is later repealed by the city council.

If the date of a general municipal election is changed pursuant to this section, at least one election shall be held before the ordinance, as approved by the board of supervisors, may be subsequently repealed or amended.

STATEMENT OF THE CASE

On September 30, 1981, the California state legislature passed as an urgency statute Senate bill 230, Statutes 1981, Chapter 1013, allowing for the consolidation of municipal elections with statewide general, primary or school district elections. Senate Bill 230 enacted Government Code Section 36503.5. Subdivision (a) of the statute which was designed to save funds unnecessarily spent on duplicative elections clearly gives the power to chose to consolidate elections to municipal council members. Specifically the provision states that the Board of Supervisors must approve municipal activity invoking Government Code Section 36503.5 unless the logistics of the consolidation are problematic.

In the instant case the decision to consolidate the elections of the Town of Los Gatos with Santa Clara County elections 19 months away was made by the Los Gatos Town Council. On January 11, 1982, by a vote of three-to-one with one councilmember absent the town council voted to cancel the election which had been publicly scheduled to be held on April 13, 1982, and rescheduled the election for November 8, 1983.

Two of the council members who voted for the consolidation were themselves serving representative terms that were scheduled to expire on the date of the postponed election April 13, 1982. As a result of the election consolidation and pursuant to subdivision (b) of California Government Code Section 36503.5 these council members remained in what are publicly recognized as elected offices for over a year longer than they had been elected.

As a review of the record reflects, these particular council members' seats were the subject of intense controversy in the town even before the elections were consolidated. The postponement of the April 1982 election by interested council members along with the highly charged political environment culminated in a petition for recall.

Appellants, citizens of the Town of Los Gatos, petitioned the supreme court of the State of California on February 3, 1982 requesting a writ ordering Repondent to hold the regularly scheduled election. The petition was denied without hearing on March 10, 1982.

Appellants then filed a petition in the Superior Court of California in and for the County of Santa Clara requesting similar relief on March 12, 1982. An alternative writ was issued and following a hearing on March 22, 1982, the petition for writ of mandate was denied on the grounds that "the change of the date for an election does not itself deny anyone the right to vote."[1]

The controversy then was considered by the Sixth Appellate District Court of Appeals for the State of California in which the appellants alleged that the government code section among other things violated state and federal due process laws. The appeal was dismissed after arguments and a hearing on the grounds that the controversy was moot. The decision was appealed to the Supreme Court of the State of California which denied review without a hearing.

Government Code Section 36503.5 was amended by Statutes 1982, Chapter 218, § 2, apparently as a result of much of the controversy surrounding the numerous postponements of city elections statewide. Subdivision (b) of the statute was amended to restrict the increasing of any term of office pursuant to the change of election date by the statute to no more than (10) ten months, and in subdivision (f) the amendment requires that after a postponement of an election pursuant to the statute, at least one election must be held before another postponement may be allowed.

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[1] See Appendix D, Superior Court Opinion

Although the amendments eliminate the ominous possibility of a town council being able to perpetuate its term in representative office indefinitely by continual postponements of elections, and although the amended statute would now limit the extension of a term to less than a year, appellants contend that such amendments do not rid the statute of its constitutional infirmities.

Appellants now petition this Supreme Court for a writ of certiorari alleging that California Government Section 36503.5 violates the procedural due process clause of the United State Constitution.

REASONS FOR GRANTING WRIT

The Public's Interest in Preserving the Integrity of the Electoral Process is an Important Interest in Liberty.

Preservation of the integrity of the electoral process from even the appearance of corruption along with the maintenance of the active, alert citizen in the democratic process of government are interests of the highest importance. *Buckley v. Valeo* 422 U.S. 1, 26-27, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976); *United States v. Automobile Workers* 352 U.S. 567, 570, 1 L.Ed.2d 563, 77 S.Ct. 529 (1957). Preservation of the individual citizen's confidence in government is equally important. *Buckley*, supra, at 27, 46 L Ed2 659, 96 S. Ct. 612; *CSC v. Letter Carriers* 413 U.S. 548, 565, 37 L Ed 2d 786, 93 S. Ct. 2880 (1973). *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482 (1976).

The importance of the orderly administration of elections cannot be over emphasized in a country such as the United States wherein the federal and state governments in absolute terms

must rely upon representative elections to organize its legislative officials. (As to Congress see Article 1, Section 4, as to State Legislators see *Sailors v. Board of Education* 387 U.S. 105 (1967)).

The interest in preserving the integrity of elections is the same as the interest in preserving an important interest in liberty. Logic suggests that if local and state elections are allowed to erode the public's confidence in election systems and by so doing discourages full participation in the electoral process that the liberty interests of the people are threatened.

The Public has a protected liberty and/or property interest in seeing that vested elections are conducted orderly and that incumbent representatives cease to publicly hold office under color of election beyond the expiration of their election term.

Appellents contend that although the State of California arguably could have properly appointed Town Council Members for the Town of Los Gatos (*Sailors v. Board of Education* supra), that because the State had publicly scheduled the election of April 13, 1982 and because incumbents terms were scheduled to expire on the same date, that the entitlement to vote in the April 13, 1982 election and the expectation that the incumbents would cease holding their offices by color of election on the same date vested in the people of the town. Furthermore, appellants contend that such vested interests are liberty and property interests within the meaning of Fourteenth Amendment of the United States Constitution.

The interests that appellants have in upholding the integrity of their local election process is an interest in liberty. In *Meyers v. Nebraska* 262 U.S. 390, 399 (1923) the scope of interests in liberty was described to include the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." No privilege

more keenly fits this description than the privilege to participate in properly conducted local elections. The appellants[2] interests in the improprieties surrounding the publicly scheduled Town of Los Gatos election then are liberty interests which may not be deprived them except for through due process.

Deprivation of the Appellants interest in the orderly administration of town elections is tantamount to a deprivation of liberty and as such must meet procedural due process requirements.

Assuming that appellants' interest in the orderly administration of elections which includes the orderly cancellation of publicly scheduled elections is a sufficiently protectable interest in liberty or property, the *Matthews v. Eldridge* 424 U.S. 319 (1976) test is applicable when determining whether or not the California Government Code Section fulfills procedural due process requirements.

The Appellant's Interests in Liberty are Fundamental

The first prong of the tripartite *Matthews v. Eldridge* test in determining the extent of the procedural due process requirements appropriate for any particular case is to assess the importance of the individual interest involved. In the instant case Appellants' interests are fundamental. As discussed above it is undisputed in American law that the integrity of the electoral process and the active participation of the individual

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[2]Appellants argue in the alternative that their interest in preserving the integrity of the election process and voting in the regularly scheduled election is a protectable property interest. Compare to other interests which have been found to be property interests; driver's license *Bell v. Burson* 402 U.S. 535 (1971), continued utility service *Memphis Light, Gas and Water Division v. Craff* 436 U.S. 1 (1978), and public education *Gross v. Lopez* 419 U.S. 565 (1975). Appellants contend that in light of the fact that town councils exercise great power over land usage issues including the issuance of noise and zoning permits that a vested right to vote in regularly scheduled town elections that have been announced is a sufficient interest in property to trigger the protections of procedural due process.

citizen are interests of the highest importance. *Buckley v. Valeo* 424 U.S. 1, 26-27, 46 L Ed2d 659, 95 S. Ct. 612. Preservation of the individual citizen's confidence in government is equally important. *Buckley*, supra, at 27.

The Risk of elections being consolidated primarily for the purpose of extending the terms of office of council members is high in light of the nature of politics. Alternatively, simple alterations in the procedure whereby the state consolidates elections can remove 100% of the conflict of interest which taints the consolidation.

The second step in the *Matthews v. Eldridge, supra,* test is to evaluate the risk of an erroneous deprivation of the protected interest through the procedures used. Also to be considered is the probable value, if any, of additional or substitute safeguards to that interest. Clearly the tradition of politics in general and local politics specifically is one of heated campaigns and close contests. The risk that a council member would invoke Government Code Section 36503.5 publicly to save funds while clandestinely orchestrating the manipulation of his re-election date is too high if the possibility of it happening exists at all. "Our system of laws has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin* 421 U.S. 35, 47 quoting *In Re Murchinson* 349 U.S. 133, 136.

Throughout the entire country formal and informal guideline of ethics compel public officers to avoid substantial conflicts of interest. Traditionally any personal or financial stake is sufficient to trigger an investigation into a claim of a biased decision maker. In the instant case the council members are statutorily confronted with a classic conflict of interest as they stood to gain 19 months of public recognition as an elected not appointed officials. Despite the amendment, the conflict still is present as to over 80% of a year.

Clearly the risk of an erroneous deprivation of liberty related interests can be eliminated altogether if simple statutory schemes are adopted in contrast to the present one. A proper means of consolidating elections may be easily found without resorting to such constitutionally infirm procedures. In particular, the Court's attention is directed to California Government Code Section 36504[3] wherein cities of a population of 10,000 or less, situated in a county of the 50th class, may also consolidate their elections. Pursuant to subdivision (b) of Government Code Section 36504, the consolidated election with its corresponding enlarged term of office may occur only after an election is held on a regularly scheduled date and notices are contained in the voter's pamphlets stating that the voters are voting for candidates who will hold their term of office for a greater duration than normal. By such a simple change it is the voters who elect their city council persons to extended terms of office, not the interested city council persons themselves.

Of course many solutions are available and appellants concede the state of California has its choice among constitutionally proper ones, but the point is that alterations in the statute can eliminate all risk of a postponement of a regularly scheduled election by an incumbent who has a conflict of interest.

The State's interest in saving public funds although important is not more compelling than the interest in preserving the integrity of the administration of elections & no administrative or financial burden will be incurred by the state if it rids the statute of its constitutional infirmity.

The last component of the *Matthews v. Eldridge* test is to examine the governmental interest involved and to evaluate the additional burdens that the government will incurr if greater procedural safeguards are required. In the instant case it is clear that the State of California statute is designed to save public funds expended on administering duplicative election tasks.

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[3]Government Code Section 36504 is set forth in Appendix E, page 27.

This interest is an important fiscal one. However, there is no evidence that the state of California's interest to save funds and the appellants' interest in having the state provide that the party making the decision to postpone regularly scheduled elections is a disinterested decision maker are mutually exclusive. On the contrary an assessment of the alternatives available to the state showed that the state could accomplish its purpose and protect completely the appellants' important interest. By simply removing the decision from the interested body the state could accommodate both its fiscal interests and the more sacrosanct liberty issues of appellants.

California Government Code Section 36503.5 violates Procedural due process as tested by Matthews v. Eldridge.

The above discussion demonstrates that the state of California has deprived the appellants of an important interest and that the process used to effectuate that deprivation will not stand up to the test outlined in *Matthews v. Eldridge*. A fair weighing and balancing of the concerns of the state against those of the appellants yield a clear understanding that the state is unnecessarily jeopardizing the integrity of the election system and such activity is repugnant to the ideals of liberty espoused by the United States Constitution.

The denial of due process of these appellants is capable of repetition yet will evade review and is therefore not moot.

California Government Code Section 36503.5 is still in effect. City councils may again cancel elections to be consolidated as in the case of Los Gatos with a different election. Election cancellation may occur in other cities throughout California. Obviously, however, such consolidations will evade review prior to the former election date and thus the constitutionality must be decided after the cancelled election date. It has been three years since the Los Gatos Town Council voted to cancel the April 1981 election. The controversy is therefore not moot. *Roe v. Wade* 410 U.S. 113 (1973).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

BURNETT, BURNETT & ALLEN

By: _____
DOUGLAS B. ALLEN

By: _____
DEWEY V. HARPAINTER

Dated: December 10, 1985

APPENDIX A

Filed September 11, 1985
In The Supreme Court
State of California

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

6th District, No. A018252

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

HAMILTON et al., Appellants,

v.

ALDAG, TOWN CLERK FOR LOS GATOS, Defendant;
FERRITO et al., Respondents.

Appellants' petition for review DENIED.

/s/
Chief Justice

APPENDIX B

Filed June 21, 1985
Court of Appeal—Sixth App. Dist.
State of California

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPEALLATE DISTRICT

ROBERT HAMILTON, WARREN BISBEE and MARIAN COSGROVE,

Plaintiffs and Appellants,

Santa Clara County
Super. Ct. No. 495189

vs.

ROSE ALDAG, TOWN CLERK FOR LOS GATOS,

Defendant.

TOM FERRITO, et al.,

Real Parties in Interest and Respondents.

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INTRODUCTION

In their petition for writ of mandate, plaintiffs Robert Hamilton, Warren Bisbee, Marian Cosgrove, and Citizens for the Responsive Government sought an order (1) compelling defendant Rose Aldag, Town Clerk of Los Gatos, to hold a general municipal election on April 13, 1982, or as soon thereafter as possible, and (2) declaring Government Code section 36503.5 unconstitutional as a violation of the right to vote. The writ of mandate was denied. We find that the case is moot and should be dismissed.

APPENDIX B

STATEMENT OF FACTS

On September 30, 1981, the state Legislature passed, as an urgency statute, Senate Bill No. 230 (Stats. 1981, ch. 1013, § 3, p. 3910) authorizing cities to hold a general municipal election on "the same day as the statewide direct primary election, the day of the statewide general election, or on the day of school district elections, . . ." (Gov. Code, § 36503.5, subd. (a).)

In accordance with existing law, a general municpal election for the Town of Los Gatos had been scheduled for April 13, 1982. However, on January 11, 1982, the Town Council of Los Gatos adopted Ordinance No. 1524 pursuant to the newly-enacted legislation. The ordinance provided that the general municipal election would be scheduled for the same day as the local school district election. Thus, the election date was changed from April 13, 1982, to November 8, 1983. Postponement of the election date extended the terms of town council members by 19 months.

On February 3, 1982, plaintiffs filed a petition for writ of mandate with the California Supreme Court, seeking restoration of the April 13 election. The Supreme Court denied the petition on March 10, 1982.

On March 12, 1982, plaintiffs filed a petition for writ of mandate with the Superior Court of Santa Clara County seeking to compel the regularly scheduled election. After a hearing held on March 22, 1982, the court issued a memorandum of decision denying the writ of mandate.

APPENDIX B

On May 26, 1982, the Governor of California approved Assembly Bill No. 2367 (Stats. 1982, ch. 218, § 2, p. 731) amending Government Code section 36503.5 effective January 1, 1983.[1] Subsection (b) provides that no term of office shall be increased or decreased by more than ten months and subdivision (f) required that at least one election be held before the local ordinance may be repealed or amended.

On June 2, 1982, a special municipal election was held in Los Gatos to allow the people to decide the election date. The voters determined that the general municipal elections should be consolidated with the statewide general elections. Thus, the town council adopted Ordidance No. 1541, advancing the date of the general municipal election from November 8, 1983, to the day of the statewide general election. Ordinance No. 1524 was repealed.

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[1]Government Code section 36503.5 provides: (a) A city council may enact an ordinance requiring its general municipal election to be held on the same day as the statewide direct primary election, the day of the statewide general election, or on the day of school district elections, as set forth in Section 2602 of the Elections Code. Any ordinance adopted pursuant to this subdivision shall become operative upon the approval of the board of supervisors. An ordinance shall be approved by the board of supervisors unless the ballot style, voting equipment, or computer capability is such that additional elections or materials cannot be handled. [¶] (b) As the result of the adoption of an ordinance pursuant to this section, no term of office shall be increased or decreased by more than 10 months. [¶] (c) If an election is held pursuant to subdivision (a), and the election is consolidated with another election, the provisions contained in Part 2.5 (commencing with Section 23300) of Division 14, except Section 23302, of the Elections Code shall govern the consolidation, and, if the county clerk is requested to conduct the municipal election, Section 22003 of the Elections Code shall be applicable to that election. [¶] (d) If, pursuant to subdivision (a), a general municipal election is held on the same day as a statewide election or the same day as a school district election, those city officers whose terms of office would have, prior to the adoption of the ordinance, expired on the Tuesday succeeding the second Tuesday in April of an even-numbered year, shall, instead, continue in their offices until

(Continued)

APPENDIX B

4.

On November 2, 1982, the Town of Los Gatos held its general municipal election.

On November 6, 1984, the Town of Los Gatos held another general municipal election.

We determine that intervening events have rendered the principal issue in this case moot.

Where an appellate court cannot grant effectual relief to a party, the appeal must be dismissed. " '[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him [or her] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.' " (*Consol. etc. Corp.* v. *United A. etc. Workers* (1946) 27 Cal.2d 859, 863.)

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[1](Continued)
no later than the fourth Tuesday after the day of the general municipal election, and until their successors are elected and qualified. [¶] (e) Within 30 days after the ordinance becomes operative pursuant to subdivision (a), the city clerk shall cause a notice to be mailed to all registered voters informing the voters of the change in the election date. The notice shall also inform the voters that as a result in the change in the election date, elected city officeholders' terms in office will be changed. [¶] (f) If a city adopts an ordinance pursuant to subdivision (a), the municipal election following the adoption of the ordinance and each municipal election thereafter shall be conducted on the date specified by the city council, in accordance with subdivision (a), unless the ordinance in question is later repealed by the city council. [¶] If the date of a general municipal election is changed pursuant to this section, at least one election shall be held before the ordinance, as approved by the board of supervisors, may be subsequently repealed or amended."

APPENDIX B

The election plaintiffs sought to have held on April 13, 1982, was held on November 2, 1982. A subsequent election was held on November 6, 1984. Obviously this court is not able to grant the relief requested.

Plaintiffs contend, however, that the instant case should not be declared moot, because the statute allows future council members to shorten or extend their terms of office without prior voter approval. Plaintiffs further contend that the statute in question infringes upon their right to vote and is a matter of general public interest. Thus, they contend that the instant case falls within the exception to the general rule governing moot cases.

Plaintiffs rely on several cases to support their position. In *District Election etc. Committee* v. *O'Connor* (1978) 78 Cal.App.3d 261, a conflict existed between the city charter and the Government Code regarding the initiative process. Although the election had already been held, the court reached the merits of the case. The court stated that " 'where. . .issues on appeal affect the general public interest and the future rights of the parties, and there is reasonable probability that the same questions will again be litigated and appealed, an appellate court may, although the appeal be subject to dismissal, nevertheless adjudicate the issues involved. [Citations.]' " (*Id.*, at pp. 265-266.)

Other cases in which courts have determined that the holding of an election did not render the case moot are *Rees* v. *Layton* (1970) 6 Cal.App.3d 815 (whether city election code provision that the incument's occupation would be stated on the ballot, while that of the non-incumbent could not be so designated was constitutional); *Zeilenga* v. *Nelson* (1971) 4 Cal.3d 716 (constitutionality of residency requirements for candidates of office); *Coe* v. *Davidson* (1974) 43 Cal.App.3d 170,

174 (whether the declarations of candidacy used by the registrar of voters should contain a loyalty oath); *Ortiz* v. *Board of Supervisors* (1980) 107 Cal.App.3d 866 (review of ordinance redistricting supervi[illegible]rial districts). In each of these cases, the issue was one of ge[illegible]eral public interest and there was a reasonable probability [illegible]hat the issue would arise in future elections.

In our view, the present case cited by plaintiffs. While plaintiffs characterize the statute as an infringement on the right to vote, we see that statute as authorizing municipal governments to consolidate elections, thus decreasing election costs and increasing election participation. The statute has since been amended to substantially reduce the possible delay in election which might be occasioned by any future change.

Given the fact that a change has been made to effectuate the statutory purpose and two elections have been held thereunder, it appears unlikely that another change will be made. Thus, while plaintiffs raise an issue of general public interest, it is not reasonable probable that the issue will again be litigated and appealed.

For these reasons, we hold that the issue is moot and accordingly the appeal is dismissed.

APPENDIX B

7.

_____

Agliano, J.

WE CONCUR:

_____

Panelli, P.J.

_____

Brauer, J.

Hamilton v. Aldag (RPI: Ferrito, et al.)
A018252

APPENDIX C

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SIXTH APPELLATE DISTRICT

Harpainter, Dewey V.
12 South First Street
Suite 207
San Jose, CA 95113

HAMILTON, ROBERT, ET AL.
vs.
ALDAG, ROSE, TOWN CLERK FOR LOS GATOS
FERITO, TOM, ET AL.
A018252
Santa Clara County No. 495189

* * REMITTITUR * *

I, RICHARD J. EYMAN, Clerk of the Court of Appeal of the State of California, for the Sixth Appellate Distict, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on June 21, 1985 and that this opinion or decision has now become final.

____Appellant ✓ Respondent to recover costs
____Each party to bear own costs
____Costs are not awarded in this proceeding

Witness my hand and seal of the Court affixed at my office this SEP 30 1985.

RICHARD J. EYMAN, Clerk

SEAL

By: C.L. WEBB, Deputy

APPENDIX D

Filed April 14, 1982
Superior Court
State of California

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

ROBERT HAMILTON, et al.,

Petitioners,

vs.

No. 495189

ROSE ALDAG, et al., **MEMORANDUM OF DECISION**

Respondents.

TOM FERRITO, et al.,

Real Parties in Interest

Petitioners seek a writ of mandate to invalidate the action of the Town Council of Los Gatos which canceled the municipal election to be held on April 13th and scheduled an election for November 8, 1983. Because of the lack of time, all parties agreed that an April 13th election would be impossible and that the requested writ of mandate was to order an election at the earliest possible time.

In essence petitioners contend that Senate Bill No. 230 (Chapter 1013 Statutes of 1981) is unconstitutional for the following reasons:

That is denies the fundamental right to vote.

That it violates Article IV, section 8(d) of the California Constitution in that it changes the term of office by an urgency statute.

That it impermissibly delegates legislative power.

APPENDIX D

Petitioners also contend that the action of the Los Gatos Town Council was improper because of a conflict of interest and because the Town Council did not set an election at the earlist possible date.

The change of the date for an election does not of itself deny anyone the right to vote. Moreover, there is no indication that the election date could be changed so often as to ultimately deny the right to vote.

There is no violation of section 8(d) of the California Constitution since the legislation itself did not work any change in the salaried term or duties of any office. It was enabling legislation only. The Constitution in Article XI section 2(a) does not require that cities have the same election date but rather uniform procedures for city formation. Much of the general law with regard to cities allows for differences based on local choice. The procedures, however, are equally applicable to all general law cities.

There is no impermissible delegation of legislative power since there is no uncontrolled discretion to establish nor change election dates. Rather, there is a choice of limited dates and that choice is made upon the implied standard of cost saving and increased participation.

Acting on an ordinance under valid state legislation is not a conflict of interest. Here the State Legislature specfically authorized the terms of office to be extended and the motive of any individual council member is not relevant to the legal question of whether there is a conflict. Moreover, the mere salary that will be received does not constitute such a financial interest

as to be cognizable under the Political Reform Act. Salary for performance of an official office is not included as income under that Act and in any event the rule of necessity allowed all of the council members to act on this particular ordinance since all might have the same interest at any given time.

The petition for writ of mandate is denied.

DATED: April 14, 1982.

/s/
DAVID W. LEAHY
Judge of the Superior Court

APPENDIX D

Filed April 14, 1982
Superior Court
State of California

In the Superior Court of the State of California
IN AND FOR THE COUNTY OF SANTA CLARA

Petitioners
Robert Hamilton, et al

Respondents
Rose Aldag, et al
Tom Ferrito, et al, Real Party in Interest

PROOF OF SERVICE BY MAIL OF:

☐ Trial Setting Conference Order
☐ Pre-Trial Conference Order
☐ Addendum to Pre-Trial/Trial Setting
☒ Memorandum of Decision
☐ _____
☐ ORDER _____

Case Number
495189

THE UNDERSIGNED SAYS THAT: "I AM A CITIZEN OF THE UNITED STATES, OVER 18 YEARS OF AGE, EMPLOYED IN THE SANTA CLARA COUNTY AND NOT A PARTY TO THE WITHIN ACTION. THAT MY BUSINESS ADDRESS IS COURT HOUSE, SAN JOSE, CALIFORNIA. THAT I SERVED THE WITHIN BY CAUSING TO BE PLACED A TRUE COPY THEREOF IN AN ENVELOPE ADDRESSED TO PARTIED SHOWN BELOW WHICH ENVELOPE WAS THEN SEALED AND POSTAGE FULLY PREPAID THEREON, AND THEREAFTER WAS DEPOSITED IN THE UNITED STATES MAIL AT SAN JOSE, CALIFORNIA, ON DATE SHOWN BELOW: THAT THERE 'S DELIVERY SERVICE BY THE UNITED STATES MAIL AT THE PLACE SO ADDRESSED, OR REGULAR COMMUNICATION BY UNITED STATES MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED" AS SHOWN.

APPENDIX D

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.
Executed on 4/14/82
at San Jose, California

JOHN KAZUBOWSKI,
COUNTY CLERK

By /s/
Deputy Clerk

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APPENDIX E

§ 36504. When general municipal election held: Cities of 10,000 or less in counties of 50th class

(a) A city, containing a population of 10,000 or less and situated in a county of the 50th class, as set forth in Section 28071, may enact an ordinance requiring its general municipal election to be held on the same day as the statewide general election.

(b) The provisions of subdivision (a) shall apply at the second ensuing municipal election occurring after the enactment of the ordinance.

However, the general municipal election immediately following the adoption of the ordinance shall be held on the second Tuesday in April in the next ensuing even-numbered year following the adoption of the ordinance. At such election the city clerk shall cause a notice to be included in the sample ballot mailings informing the voters of the change in the election date. Such notice shall also inform the voters that a result in the change in the election date, elected city officeholders' terms in office will be extended.

If a city adopts an ordinance pursuant to subdivision (a), the second ensuing municipal election followng the adoption of the ordinance and each municipal election thereafter shall be conducted on the date specified in subdivision (a), unless the ordinance in question is later repealed by the legislative body.

Added Stats 1979 ch 376 § 3.

APPENDIX F

S. F. No. 24391

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

HAMILTON, ETC., ET AL., Petitioners,

v.

ALDAG, ETC., Respondent;
FERRITO ET AL., Real Parties in Interest.

Petition for writ of mandate DENIED.

/s/
Chief Justice

FILED
JAN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1130

IN THE

Supreme Court of the United States

October Term, 1985

ROBERT HAMILTON, WARREN BISBEE and MARION COSGROVE, *Petitioners*

vs.

ROSE ALDAG, TOWN CLERK FOR THE TOWN OF LOS GATOS, *Respondent*

Tom Ferrito, Pete Siemens, Brent Ventura, Marlyn Rasmussen, Ruth Cannon, James Stoops, Real Parties in Interest and Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California for the Sixth Appellate District

BRIEF IN OPPOSITION

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STATEMENT OF QUESTION PRESENTED

Whether Petitioners' contentions are moot because the State Legislature amended Government Code Section 36503.5 to limit the increase in councilmember terms to ten months and to require at least one election be held on the new date and because the Town electors chose the new date for the general municipal election and two such elections have been held.

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No. 85-1130

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROBERT HAMILTON, WARREN BISBEE and
MARION COSGROVE, *Petitioners*,

vs.

ROSE ALDAG, TOWN CLERK FOR
THE TOWN OF LOS GATOS, *Respondent*

TOM FERRITO, PETE SIEMENS, BRENT VENTURA
MARLYN RASMUSSEN, RUTH CANNON, JAMES STOOPS,
Real Parties in Interest and Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

JURISDICTION

The section under which Petitioners invoke the jurisdiction of the United States Supreme Court is inapplicable as 28 U.S.C. § 1256 has been repealed. Petitioners have not indicated that 28 U.S.C. § 2403(b) may be applicable because the constitutionality of a statute of the State of California is drawn in question. The petition does not state that the Attorney General of the State of California has been served pursuant to Supreme Court Rule 28.4(c).

STATEMENT OF THE CASE

The Statement of Facts set forth by the California Court of Appeal for the Sixth Appellate District is accurate. (Pet. App. B., pp. 15-18.)

REASONS FOR DENYING CERTIORARI

Certiorari should be denied because no federal question was decided by the state court inasmuch as the state appellate court dismissed the case as moot.

The applicable considerations for review on a writ of certiorari to determine whether special and important reasons exist are set forth in Rule 17 of the United States Supreme Court. In particular, Rule 17.1(c) provides that a state court has decided an important question of federal law which should be settled by this Court or decided a federal question in conflict with applicable decisions of this Court. The last state court issuing a decision in this case was the California Court of Appeal which dismissed the case as moot. That court did not decide any question of federal law.

The issue of mootness must be considered prior to a review of the constitutional validity of California Government Code Section 36503.5. *Lane v. Wilson*, 307 U.S. 268 (1939). Since Petitioners filed their state court action, the statute which they challenged was amended to provide that no term of office shall be increased or decreased by more than ten months and that at least one election must be held on the new date prior to changing the election date again. These amendments to Government Code Section 36503.5 should be considered together with certain intervening facts which have occurred since Petitioners filed their lawsuit in state court: (1) a special municipal election was held in the Town of Los Gatos in which the electors voted for consolidation of the general municipal election with the general statewide election and (2) two general municipal elections have been held on the selected date.

Even in cases arising in state courts, the question of mootness is a federal one that the federal court must resolve before it assumes jurisdiction. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). On certiorari, Petitioners have the burden of showing the error of the judgment to be set aside. *Higgins v. Carr Bros. Co.*, 317 U.S. 572 (1943). Therefore, Petitioners must first convince this Court that dismissal for mootness by the California Court of Appeal was not correct and that the case is not now moot.

Certiorari should be denied because no case or controversy exists pursuant to Article III Section 2 of the United States Constitution.

Since the 1890's this Court has enunciated that its duty is to decide actual controversies by a judgment which

can be carried into effect, and not to give opinions on moot questions. *Mills v. Green*, 159 U.S. 651, 653 (1895). No justiciable controversy is presented when the question sought to be adjudicated has been mooted by subsequent developments. *California v. San Pablo & T.R.Co.*, 149 U.S. 308 (1893). In more recent times, the issue of mootness has been expressed in terms of failure to meet the case or controversy requirement of Article III, Section 2 of the United States Constitution. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3. (1964).

The purpose of the case or controversy requirement is a broad limitation which maintains the separation of powers by assuring that the federal courts will not intrude into areas committed to other branches of government. *Flast v. Cohen*, 392 U.S. 83 (1968). In discussing the rule against advisory opinions, this Court stated that such a rule "implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Id.* at 96. In this case, the amendment to Government Code Section 36503.5 by the California Legislature addresses Petitioners' concern that a city council would extend its terms indefinitely depriving Petitioners of the right to vote. A decision by this Court would surely intrude into the legislative area at a time when the California Legislature has already acted to amend the statute challenged by Petitioners.

Further support that this case is not justiciable because it does not meet the case or controversy requirement is the holding by this Court that an actual controversy must exist at all stages of review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). Although a controversy existed when Petitioners sought a writ of mandate with the Superior Court of Santa Clara County on March 12, 1982, a controversy no longer

exists. The election that Petitioners sought to compel the Town of Los Gatos to hold was held on November 2, 1982.

The cancellation of a general municipal election in the Town of Los Gatos would be governed by the limitations of Government Code Section 36503.5. Since the Los Gatos electorate has indicated its preference for consolidation of the general municipal election with the general statewide election, it is pure conjecture by Petitioners that a similar controversy would occur. Mere speculation about possible recurrence is not sufficient to avoid mootness. *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *rehearing denied* 312 U.S. 712 (1941); *petition denied* 317 U.S. 594 (1942). Academic or episodic problems are not sufficient "special and important" reasons within Supreme Court Rule 17 to support the granting of certiorari, especially in cases involving constitutional questions. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

If Petitioners were to be dissatisfied with a subsequent change of election dates, they could file a new action. The availability of such a remedy is another reason that this Court should find that this case is not an exception to the mootness doctrine. See *DeFunis v. Odegaard*, 416 U.S. 312, 319 1974). Consequently, this Court should not grant certiorari because no current controversy exists and any new controversy, should it arise, could be addressed by the filing of a lawsuit at such time.

In accordance with the reasons behind the mootness doctrine, this petition should be denied to preserve flexibility in the law by not creating unnecessary precedent. Petitioners raise novel legal issues in the petition: analogyzing the right to vote in a scheduled election to a vested property right and creating the term "color of elec-

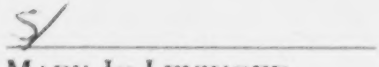
tion". Respondents urge this Court to be cautious in considering Petitioners' contentions because of the great gravity and delicacy of constitutional cases and the broad stare decisis effect of constitutional decisions. *Ashwander v. TVA*, 297 U.S. 288, 345 (1936), (Brandeis, J., concurring), *rehearing denied* 297 U.S. 728 (1936); *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting), *rehearing denied* 324 U.S. 885 (1945). The mootness issue in this case must first be resolved before this Court broaches the constitutional challenge to the California statute now amended. For these reasons, exercise of judicial discretion compels denial of the petition.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: January 30, 1986

Respectfully submitted,



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